VIRGINIA SECTION

MINES AND MINERALS—RIGHTS OF GRANTEE OF COAL TO USE UNDERGROUND HAULWAY MADE IN MINING THE COAL.—The recently decided Virginia case, *Clayborne* v. *Camilla Red Ash Coal Co., etc.*,[1] is in direct conflict with the prevailing, if not the wholly unbroken, current of authority in this country. The facts of the case were briefly as follows:

The plaintiff was owner of a certain tract of land except the coal thereon, which belonged to the defendant under a deed made in 1887, conveying "all the *coal* on, in, or under" the land, "with the right to mine and remove". The defendant also owned the adjoining tracts on both sides of the plaintiff. In mining the coal on the plaintiff's tract he had driven an underground haulway entirely through that tract extending into both of his own tracts and had removed all of the coal therefrom. A track was placed on the substratum of this haulway and over it the defendant was hauling coal mined on one of his tracts to the other. The plaintiff brought a suit to enjoin him and the injunction was granted.

There is no precedent for this point in this State. The next question is, do the decisions of the other States establish a rule of property for this State? Kelly, P., in rendering the opinion in the above case, after remarking that the question was an open one, says, "No rule of property can be said to have arisen in this State upon the subject." And this is borne out by authority.[2]

Conceding then that there is no rule of property binding the Virginia court, we will take up the discussion of the main point. This, in short, is, can one who is the grantee of coal on a certain tract use an underground haulway, made in mining the coal in that tract, for the purpose of removing the coal in an adjoining tract? The principle that such use could be made of the haulway was established by the case of *Lillibridge* v. *Lackawanna Coal Co.*,[3] three of the seven judges dissenting. In the main, the other American cases have followed this; so a discussion of them will be omitted here. As said in the instant case, "they are right if the first and leading American case was right, they are wrong if that case was wrong".[4]

If the privilege of using an underground haulway in the manner stated exists, by what *legal* right does it exist? We shall concede for the purpose of this analysis that the grantee of the coal has a corporeal freehold estate in it, for if he had only an incorporeal right to mine the coal, there would be absolutely no

[1] 105 S. E. 117.

[2] 34 Cyc. 1821; 11 Cyc. 755; Edwards *v.* Davenport, 20 Fed. 756.

[3] 143 Pa. St. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; 27 Cyc. 699.

[4] For citation and review of authorities, see Clayborne *v.* Camilla Red Ash Coal Co., etc., *supra.*

ground for allowing him the use of an underground haulway to remove coal from the adjoining land.

There is but little authority stating that the grantee of the coal has the property of the containing chamber also. But there is an abundance of authority stating that a grantee has the right to use an underground haulway in the manner stated.[5] But what is the legal right and how is it obtained? Is it an easement or a grant, and what is its nature and extent? On this point the cases are astonishingly silent except for the statement that the deed granting the coal also grants the space it occupies, some cases going to the extent of saying that an estate in the substratum or shell is also granted. If this is true, if the grantee of the coal is also the grantee of a freehold estate in the space it occupies and in the shell surrounding it, then the Virginia case is clearly wrong. For certainly one may do what he will with his own.

But what is the nature of this estate in the shell? Is it a fee simple, a life estate, or what is it? That the grantee has the whole estate in the coal itself, the fee simple, cannot be disputed. It is equally certain that the estate claimed for him in the space and shell must be less than a fee simple. For it is admitted the space and shell revert to the grantor after the mining operations have ceased. This reversion is certain. It is what is known as a "true reversion", and this, after a fee simple, is impossible.[6] Neither can the estate claimed be a life estate, for it is to last as long as any of the coal remains unmined. Then if any estate was granted to the shell and space by the deed that granted the coal, we must imply a limitation in the deed that such estate is to continue until all the coal is mined. An estate of this nature it seems is what is termed a descendible freehold.[7] If this estate is obtained by the grantee, again we must say the Virginia case was decided wrong, for such an estate would give him the right to use the substratum and space occupied by the coal as he saw fit.[8]

A discussion on the construction of deeds is beyond the scope of this note. Suffice it to say it is rather difficult to see how the same words convey one estate in the coal and another in the shell; that a limitation is implied when the deed is considered as applying to the shell and none when it refers to the coal.

The more logical doctrine, and one not wholly unsupported by authority, we think, is that the grantor conveys only the coal with an easement in the space and substratum for mining and removing it. This is the view taken by the Virginia court. This also appears to be the view taken by Professor Minor.[9]

The manner of reaching the above conclusion is indeed technical, but it must be remembered that every breach of a legal right

[5] 18 R. C. L. 1149; 27 CYC. 699 and cases cited.
[6] 1 MINOR, REAL PROPERTY, 210.
[7] 1 MINOR, REAL PROPERTY, 210.
[8] 1 MINOR, REAL PROPERTY, 210, 211.
[9] 1 MINOR, REAL PROPERTY, 63.

where there is no serious injury or the damage is negligible is more or less of this nature.

Before leaving this point, we will again refer briefly to the leading American case, *Lillibridge* v. *Lackawanna Coal Co., supra,* and also inquire into the English authorities relied upon therein. We will first consider *Bouser* v. *McLean* [10] and *Eardley* v. *Granville.*[11] Both of these were copyhold tenures with minerals under the ground. The rights of the respective parties in these cases depended to a great extent upon ancient custom and, as said in *Bouser* v. *McLean, supra,* differ from those of the parties to a freehold lease. An examination of these cases will show that it is not impossible for the ownership of the coal and of the space it occupies to be in different persons, as the leading American case indicates. It will also show that unless the owner of the coal is also the owner of the space it occupies he has no right to use this space except to the extent of his easement for mining and removing the coal.

Next *Proud* v. *Bates* will be examined.[12] This was a lease of the waste land of a manor excepting the *mines* and *quarries* and the power to mine and work the same. It is very plain here that the owner of the coal was also owner of the space it occupied. Mine is certainly a broader term than coal. The mine was in the grantor and remained in him by the exception in his grant. There is no necessity for implying a condition or limitation in the deed or doing anything more than the grantor does himself to give him the fee in the space occupied by the coal.

We shall now consider *Hamlinton* v. *Graham.*[13] This was also a reservation, or rather, under the strict English construction, an exception. The reservation was of "all and sundry the coal and limestone within the bounds of the said land". This case decided the exception of the coal gave the grantor the right to use the space occupied by it in any manner; in short, the space remained in the grantor, as in *Proud* v. *Bates, supra,* when the mine was excepted. In fact, it cites and relies upon *Proud* v. *Bates, supra,* as authority. But, in the strong dissenting opinion of Lord Chelmsford, the two cases are distinguished and it is pointed out that *Proud* v. *Bates* is not authority for the point involved in this case.

It will be noticed that all of the English decisions were cases of exceptions rather than grants. The leading American case refused to draw a distinction between the two, and while it is beyond dispute that the effect of the two can be the same, yet, in these cases, it is easier to see how an exception can give the owner of the coal an estate in the space occupied than it is to see how a grant can do so. In the former, it is only necessary to construe

[10] 2 DeGex, F. & J. 415, 17 Eng. R. C. 452.
[11] (1876) 3 Ch. D. 826.
[12] 34 L. J. Ch. 406, 11 Jur. (N. S.) 441, 9 MEW'S ENG. CASE LAW DIG. 1212.
[13] L. R. 2 Sc. & Div. App. 166.

the very words used by the grantor in his deed as including the space as well as the coal; in the latter, due to the nature of the estate in the space (a descendible freehold), it is not only necessary to construe the grantor's words as including the space as well as the coal, but as mentioned above, a condition must also be implied in the deed.

Taking all things into consideration, it appears that unless a different intention of the grantor is clearly shown, the grantee of the coal can be the owner of the coal only and has merely an easement in the space occupied by it and in the substratum for mining it.

If this is conceded, there remains but one small point to discuss, and that is, what is the extent of the easement? The answer seems very obvious. It is certainly only for mining and removing the coal on the grantor's land. The circumstances would be very exceptional indeed when it would be any broader.

B. D. A.

GIFTS OF PERSONAL CHATTELS—INCOMPLETE ASSIGNMENTS OF CHOSES IN ACTION NOT GOOD AS DECLARATIONS OF TRUST.—Gifts of personal chattels may be made only by delivery to the donee of possession of the tangible personal property itself, or by delivery of some evidence of possession which would entitle the donee to the subject matter of the gift as against all the world, and this only where it is impracticable or impossible to deliver the subject matter itself. Delivery of the subject matter of the gift to a trustee who accepts the trust is equivalent to the act of the donor in delivering the possession of tangible personal property to the donee. This proposition is so well established that citation of authority is unnecessary.

The rule as above stated has but two exceptions. The first is that acquiescence of the donor in the previously acquired possession of the donee is held to be sufficient evidence from which to imply delivery of possession.[1] The second, and only remaining exception, is the case of a gift by way of declaration of a trust. In such gifts "the donor does not part with the possession of the subject matter of the gift; but retaining it, declares that he holds it in trust for the donee".[2]

The principle seems to be well settled in the United States that as to gifts of choses in action "a donor is legally put to his election whether he will *assign,* or *declare a trust;* and if he elects the former, as is shown by his attempted assignment, the gift must stand or fall as the donor designed to make it; and if ineffectual

[1] See Shankle *v.* Spahr, 121 Va. 598, 607, 608, 93 S. E. 605; Russell's Ex'rs. *v.* Passmore (Va.), 103 S. E. 652.

[2] See *"Gifts of Personalty"*, by Prof. Graves, 1 VA. LAW REG. 871, 878.